

ATTACHMENT 4

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14 *Information Systems, Inc., and Toshiba America*

15 *Electronic Components, Inc.*

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 (SAN FRANCISCO DIVISION)

19 IN RE: CATHODE RAY TUBE (CRT)
20 ANTITRUST LITIGATION

Case No. 07-5944 SC
MDL No. 1917

21 This Document Relates to
22 Case No. 13-cv-1173-SC (N.D. Cal.)

23 SHARP ELECTRONICS CORPORATION;
24 SHARP ELECTRONICS MANUFACTURING
25 COMPANY OF AMERICA, INC.,

26 Plaintiffs,

27 v.

28 HITACHI, LTD., *et al.*,

Defendants.

**THE TOSHIBA DEFENDANTS’
MOTION FOR LEAVE TO AMEND
THEIR MOTION TO DISMISS
SHARP’S COMPLAINT**

ORAL ARGUMENT REQUESTED

Date: January 24, 2014
Time: 10:00 a.m.
Before: Hon. Samuel Conti

THE TOSHIBA DEFENDANTS’ MOTION FOR LEAVE TO
AMEND THEIR MOTION TO DISMISS SHARP’S COMPLAINT

Case No. 07-5944 SC
MDL No. 1917

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendants Toshiba Corporation, Toshiba America, Inc., Toshiba America Information Systems, Inc., and Toshiba America Electronic Components, Inc. (the “Toshiba Defendants”) hereby move the Court for an order granting the Toshiba Defendants leave to file their Amended Motion to Dismiss Sharp’s Complaint.

This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in support thereof, and such other materials and information that the Court may properly consider.

THE TOSHIBA DEFENDANTS’ MOTION FOR LEAVE TO
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1 Complaint at 1, *In re CRT Antitrust Litig.*, MDL No. 07-5944 (N.D. Cal. Oct. 7, 2013), ECF
2 No. 2000 (“Motion to Dismiss”). Because the Supreme Court issued its *Atlantic Marine*
3 decision after the briefing on this motion was complete, but before the scheduled hearing on
4 December 20, 2013, the Toshiba Defendants file this motion for leave to amend their motion
5 to reflect the proper procedural grounds for dismissing Sharp’s Complaint.

6 Although there is “no procedural rule specifically addressing amendments to motions
7 to dismiss” (*Vanslambrouck v. Fairfield Indus. Inc.*, 2:11-CV-76-FTM-29SPC, 2011 WL
8 2435947, at *1 (M.D. Fla. June 15, 2011)), courts will follow Rule 1 of the Federal Rules of
9 Civil Procedure and will grant such motions when they promote the “just, speedy, and
10 inexpensive determination” of an action. In considering a motion for leave to file an
11 amended motion to dismiss, the *Vanslambrouck* Court noted that there was “no bad faith, or
12 intent to manipulate the court proceedings, and no prejudice to the plaintiffs.”
13 *Vanslambrouck*, 2011 WL 2435947, at *2. Thus, the *Vanslambrouck* Court allowed the
14 amendment. The Court in *Styles v. Triple Crown Publications, LLC*, CIV. WDQ-11-3759,
15 2012 WL 1964443, at *3 (D. Md. May 30, 2012), also considered a motion for leave to file
16 an amended motion to dismiss, observing that the Court had not yet ruled upon the original
17 motion to dismiss and that the plaintiffs would have the opportunity to respond to the
18 amended motion to dismiss. In these circumstances, the Court allowed the amended motion
19 to dismiss because the plaintiff “will not suffer any prejudice” and “allowing the
20 amendment furthers judicial economy. *Id.* at *3. The *Styles* Court observed that there “is
21 simply no reason to put [the Defendants] to the time and expense of filing an answer, or
22 both [the Defendants and Styles] to the time and expense of addressing . . . issue[s] to be
23 raised later in a motion for judgment on the pleadings, when [the issues] can easily be
24 resolved now.” *Id.* (quoting *In re Westinghouse Sec. Litig.*, No. A-91-354, 1998 WL
25 119554, at *6 (W.D. Pa. Mar. 12, 1998) (internal quotation marks omitted)).

26 Sharp will not be prejudiced if the Court grants the Toshiba Defendants’ Motion for
27 Leave to Amend. Sharp will have the opportunity to respond to the amended motion to
28 dismiss. In reality, however, there should be no need for Sharp to file any response. The

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1 amended motion merely replaces Rule 12(b)(3) with the doctrine of *forum non conveniens*
2 as a basis for the motion to dismiss. The amended motion relies upon the pre-existing
3 briefing because the Supreme Court in *Atlantic Marine* did not change the substantive
4 analysis associated with the enforcement of forum-selections clauses; rather, that decision
5 only addressed the appropriate procedural mechanism to be used by courts and litigants. In
6 *Atlantic Marine*, the Supreme Court directed district courts to consider “public-interest
7 factors” and not arguments related to the inconvenience of a “preselected forum” in
8 determining the enforceability of a freely negotiated forum-selection clause under the
9 doctrine of *forum non conveniens*. Slip op. at 13-14. This analysis is substantively the same
10 as the analysis previously used the Ninth Circuit under Rule 12(b)(3). *See Richards v.*
11 *Lloyd’s of London*, 135 F.3d 1289, 1295-96 (9th Cir. 1998) (holding that enforcement of a
12 foreign forum-selection clause does not violate public policy). Accordingly, the arguments
13 presented in the Toshiba Defendants’ Memorandum of Points and Authorities in Support of
14 their Motion to Dismiss and their Reply in Support of their Motion to Dismiss also establish
15 the grounds for the Court to dismiss Sharp’s Complaint under the doctrine of *forum non*
16 *conveniens*.

17 Granting the motion for leave to amend the motion to dismiss also furthers judicial
18 economy. Even though the Toshiba Defendants have already filed their motion to dismiss
19 against Sharp’s claims, the Toshiba Defendants have not waived their ability to seek
20 dismissal of Sharp’s claims under the doctrine of *forum non conveniens*. These arguments
21 could be raised in a later motion. *See Chateau Des Charmes Wines Ltd. v. Sabate USA,*
22 *Inc.*, C-01-4203 MMC, 2003 WL 22682483, at *2 (N.D. Cal. Nov. 10, 2003) (allowing
23 defendant to file a second motion to dismiss under the doctrine of *forum non conveniens*
24 even though the defendant already filed a motion under Rule 12(b)(3)). Consequently, the
25 Toshiba Defendants proposed amendment to its motion to dismiss seeks only to invoke an
26 argument that could be brought later via other means.

1 For these reasons, the Court should grant the Toshiba Defendants' Motion for Leave
2 to Amend.

3
4 Dated: December 9, 2013

Respectfully submitted,

WHITE & CASE LLP

5
6 By: /s/ Lucius B. Lau

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*Counsel to Defendants Toshiba
Corporation, Toshiba America, Inc.,
Toshiba America Information Systems,
Inc., and Toshiba America Electronic
Components, Inc.*

CERTIFICATE OF SERVICE

On December 9, 2013, I caused a copy of “THE TOSHIBA DEFENDANTS’ MOTION FOR LEAVE TO AMEND THEIR MOTION TO DISMISS SHARP’S COMPLAINT” to be electronically filed via the Court’s Electronic Case Filing System, which constitutes service in this action pursuant to the Court’s order of September 29, 2008.

/s/ Lucius B. Lau

Lucius B. Lau

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Exhibit A

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25 COMPANY OF AMERICA, INC.,

26 Plaintiffs,

27 v.

28 HITACHI, LTD., *et al.*,

Defendants.

**THE TOSHIBA DEFENDANTS'
AMENDED NOTICE OF MOTION
AND MOTION TO DISMISS
SHARP'S COMPLAINT**

ORAL ARGUMENT REQUESTED

Date: January 24, 2014
Time: 10:00 a.m.
Before: Hon. Samuel Conti

THE TOSHIBA DEFENDANTS' AMENDED NOTICE OF MOTION
AND MOTION TO DISMISS SHARP'S COMPLAINT

Case No. 07-5944 SC
MDL No. 1917

1 **AMENDED NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on January 24, 2014, at 10:00 a.m., or as soon
4 thereafter as the matter may be heard, in Courtroom 1, 17th Floor, 450 Golden Gate Avenue,
5 San Francisco, California, before the Honorable Samuel Conti, Toshiba Corporation
6 (“TSB”), Toshiba America, Inc. (“TAI”), Toshiba America Information Systems, Inc.
7 (“TAIS”), and Toshiba America Electronic Components, Inc. (“TAEC”) (collectively, the
8 “Toshiba Defendants”) will and hereby do move the Court for an order dismissing the
9 Complaint of Sharp Electronics Corporation and Sharp Electronics Manufacturing Company
10 of America, Inc. (“collectively, the “Plaintiffs” or “Sharp”) (“Complaint”) as against the
11 Toshiba Defendants pursuant to the doctrine of *forum non conveniens* and Rule 12(b)(6) of
12 the Federal Rules of Civil Procedure. Sharp’s Complaint must be dismissed against the
13 Toshiba Defendants because its claims are based on purchases that are governed by a
14 contract containing a mandatory forum selection clause that selects the Osaka District Court,
15 in Osaka, Japan, as the forum to resolve disputes arising out of the contract. In the
16 alternative, Sharp’s federal and New Jersey state law claims for damages for its alleged
17 purchases of products that contain CRTs (“CRT Products”) must be dismissed against the
18 Toshiba Defendants because Sharp has failed to allege facts sufficient to support standing
19 under the “ownership or control” exception to *Illinois Brick’s* bar on indirect purchaser
20 actions.

21 This Amended Motion is based upon this Amended Notice of Motion, the
22 Memorandum of Points and Authorities filed by the Toshiba Defendants on October 7,
23 2013, the Reply Memorandum filed by the Toshiba Defendants on November 20, 2013, the
24 complete files and records in this action, oral argument of counsel, and such other and
25 further matters as this Court may consider.

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28 THE TOSHIBA DEFENDANTS’ AMENDED NOTICE OF MOTION
 AND MOTION TO DISMISS SHARP’S COMPLAINT
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Dated: December 9, 2013

Respectfully submitted,

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